STATE OF MICHIGAN
IN THE SUPREME COURT

ATLANTIC CASUALTY INSURANCE COMPANY, a Foreign corporation,

Plaintiff-Appellant,

v

GARY GUSTAFSON,

Defendant-Appellee,

and

ANDREW AHO,

Defendant.

MSC No: 154026
COA No: 325739
Lower Court No: 14-000055-CZ
(Ontonagon County)

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DEFENDANT- APPELLEE GARY GUSTAFSON'S SUPPLEMENTAL BRIEF REQUESTED BY COURT

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTIONS INVOLVED

This Contractor's insurance policy coverage dispute involves an injured homeowner and whether the homeowner's claim should be excluded by an "Exclusion of Injury to Employees, Contractors, and Employees of Contractors", and presents the following issues:

I. IS THE PHRASE "ANY PROPERTY OWNER" CONTAINED IN THE EXCLUSION TO THE INSURANCE POLICY AMBIGUOUS?

Defendant-Appellee says:	"Yes"
Plaintiff-Appellant says:	"No"
The Court of Appeals says:	"Yes"

II. MUST A PROPERTY OWNER HAVE A COMMERCIAL INTEREST IN THE PROJECT BEFORE THE EXCLUSION FOR "EMPLOYEES, CONTRACTORS, AND EMPLOYEES OF CONTRACTORS" APPLIES TO THAT PROPERTY OWNER?

Defendant-Appellee says:	"Yes"
Plaintiff-Appellant says:	"No"
The Court of Appeals says:	"Yes"

III. SHOULD THE TITLE (HEADING) OF THE EXCLUSION BE GIVEN WEIGHT IN THE INTERPRETATION OF THE EXCLUSION?

Defendant-Appellee says:	"Yes"
Plaintiff-Appellant says:	"No"
The Court of Appeals says:	"Yes"

IV. WAS IT CLEAR IN THE EXCLUSION THAT A HOMEOWNER WOULD BE INCLUDED AS A CONTRACTOR AND EXCLUDED FROM COVERAGE UNDER THE EXCLUSION FOR EMPLOYEES, CONTRACTORS, AND EMPLOYEES OF CONTRACTORS?

Defendant-Appellee says:	"No"
Plaintiff-Appellant says:	"Yes"
The Court of Appeals says:	"No"

STATEMENT OF FACTS

The facts of this case are not in dispute. Defendant-Appellee Gary Gustafson is a sole-proprietor doing business as Gustafson Excavating and Septic Systems (hereinafter "Gustafson") and was hired by Defendant Andrew Aho (hereinafter "Homeowner") to perform landscaping and drainage work around a pond located on the Homeowner's residential property. Plaintiff-Appellant Atlantic Casualty Insurance Company (hereinafter "Atlantic Casualty") provided Commercial General Liability insurance coverage for Gustafson's business. That policy of insurance is the subject of this appellate action.

The Homeowner was watching while Gustafson's employee was clearing brush along the Homeowner's pond with a brushhog (a motorized machine with circulating blades used to cut brush and other woody fiber). A piece of debris flew from the brushhog and struck the Homeowner in the eye, causing an injury. The injury was immediately reported to Gustafson's insurance agent, who assured Gustafson that the matter was covered by the Atlantic Casualty policy of insurance.

Upon review by Atlantic Casualty, they agreed the policy granted coverage for this type of loss, but claimed an Exclusion for "Injury to Employees, Contractors, and Employees of Contractors" applied to an injured Homeowner and denied coverage to Gustafson.

The Homeowner filed a personal injury lawsuit against Gustafson in Ontonagon County Circuit Court (case number 2013-000021-CZ). Gustafson tendered the defense to Atlantic Casualty. Atlantic Casualty brought this separate, related action (case number 2014-000055-CZ) seeking a declaratory judgment as to whether the subject

policy provides indemnity and/or a duty to defend Gustafson against the Homeowner's claim. The Ontonagon County Circuit Court granted Atlantic Casualty's Motion for Summary Disposition finding the exclusion in the subject policy of insurance for Employees, Contractors, and Employees of Contractors applies to an injured Homeowner and thus Atlantic Casualty does not have a duty to indemnify or defend Gustafson in the underlying action.

The Court of Appeals reversed the Circuit Court and found that a homeowner was not the type of individual envisioned in the exclusion and furthermore found that the exclusion was subject to more than one reasonable interpretation and was therefore ambiguous. (Exhibit 1). This finding was consistent with the decision of the Connecticut Superior Court [*Turano v. Pellaton*, 2014 Conn. Super. LEXIS 146; 2014 WL 660513 (2014); Exhibit 2] and the decision of the United Stated Seventh Circuit Court of Appeals [*Atlantic Casualty Insurance Company v. Paszko Masonry, Inc.*, 718 F.3d 721 (2013); Exhibit 3], which both interpreted the same exact insurance exclusion in other policies of insurance issued by Plaintiff-Appellant.

SUMMARY OF ARGUMENT

The phrase "any property owner" contained in the exclusion is ambiguous because it is capable of having conflicting interpretations. Case law requires that exclusions from coverage be strictly construed against the drafter, in favor of coverage.

Even if, *arguendo*, the exclusion is not ambiguous, case law requires that exclusions in insurance contracts be strictly scrutinized, and interpreted in favor of coverage. Also, absurd results are to be avoided.

All of the persons and entities in the exclusion are contractors with commercial interests in the construction project. A contractor is commonly defined as a person or entity furnishing services or materials to a project for monetary compensation. A commercial interest is defined as services or materials provided for profit.

The wording in the title (heading) of the exclusion should be given the same weight as other words employed, since Atlantic Casualty chose not to exclude the title (heading) from being included in the interpretation of the exclusion.

It is not clear from the exclusion that a residential homeowner claim would be excluded as being a contractor, and doing so requires a forced construction of the exclusion to allow this hidden meaning to have effect. Atlantic Casualty could have excluded the residential homeowner from coverage and then the contractor could have decided whether to purchase a policy with such an exclusion. Atlantic chose not make the homeowner's status clear, to their detriment.

In sum, the Court of Appeals was correct in finding the phrase "any property owner" ambiguous in the context of the exclusion and properly found the exclusion did not apply.

Alternatively, assuming *arguendo* that the phrase "any property owner" is not ambiguous, does not lead to a different result, just different analysis. If not ambiguous, Michigan's rules of interpretation lead to the same result. First, since the phrase is an insurance exclusion, it must be interpreted under strict scrutiny, in favor of coverage. Second, Michigan does not allow for absurd results. Even Plaintiff-Appellant has acknowledged "any property owner" cannot literally mean that. Thus, the phrase must be interpreted by harmonizing the language of the exclusion (i.e. contractors, employees of contractors and a list of persons with a commercial interest in the project at issue), which leads to the conclusion that the term "any property owner" does not include a homeowner and if that is what Atlantic Casualty intended, they should have stated so in their policy of insurance.

LEGAL ARGUMENT

I. IS THE PHRASE "ANY PROPERTY OWNER" CONTAINED IN THE EXCLUSION TO THE INSURANCE POLICY AMBIGUOUS?

1) Determining if an Insurance Exclusion is Ambiguous.

"An insurance contract is ambiguous when its provisions are capable of conflicting interpretations." *Farm Bureau Mut. Ins. Co. v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999) [See also *Klapp v United Ins. Group Agency, Inc.*, 468 Mich 459, 467; 663 NW2d 447 (2003)].

In our case, there are at least three interpretations of "property owner" identified:

a) The literal interpretation of a property owner being a person owning any property, to include the clothes on ones back.

b) The limited interpretation desired by Atlantic Casualty to include the Homeowner as a property owner, but not to go any further as suggested by a literal interpretation.

c) To interpret property owner, in the context of the exclusion as being a contractor, or persons and entities (including employees thereof) with a commercial interest in the construction project; i.e. those receiving compensation from the construction project. This does not include the homeowner.

The Court of Appeals held that because of Plaintiff's admission that the term "property owner" needed to be interpreted to avoid the absurd result of pertaining to every person owning any property (including the clothes on one's back), Plaintiff in essence admitted the exclusion to be ambiguous. (Exhibit 1, pgs.4-5). See e.g. *Hastings Mut. Ins. Co. v Safety King Inc.*, 286 Mich App 287; 778 NW2d 275 (2009), wherein the Court held exclusions are to be construed against the drafter by harmonizing the language of the exclusion and so as to avoid absurd results.

The insurance exclusion at issue, entitled: "Exclusion of Injury to Employees, Contractors and Employees of Contractors," includes a definition of contractor as follows:

> As used in this endorsement, "**contractor**" shall include but is not limited to **any independent contractor or subcontractor of any insured, any general contractor, any developer, any property owner**, any independent contractor or subcontractor of any general contractor, any independent contractor or subcontractor of any general developer, any independent contractor or subcontractor of any property owner **and any and all persons providing services or materials of any kind for these persons or entities mentioned herein**. (Emphasis added).

A contract is said to be ambiguous when its words may reasonably be understood in different ways. If a fair reading of the entire contract of insurance leads one to understand that there is coverage under particular circumstances and another fair reading of it leads one to understand there is no coverage under the same circumstances the contract is ambiguous and should be construed against the drafter and in favor of coverage. *Nikkel*, *supra*. at 566.

If the exclusion is read literally to include any property owner (including the homeowner) and all persons providing services or materials of any kind to the property owner, it leads to an absurd result. Every person has some property, including the clothes on their back, so the exclusion would apply to all people. In addition, even if the exclusion was limited to the homeowner (as suggested by Atlantic Casualty), the exclusion would also apply to anyone providing services or materials to the homeowner,

to include the nanny who happened to be sitting in the backyard during the landscaping work (she provides services to the homeowner) and the neighbor being neighborly and dropping off some fresh eggs (he provides materials to the homeowner). If the nanny or the neighbor are injured by Gustafson, according to Atlantic Casualty's interpretation of the exclusion they would be excluded from coverage under the policy; as they claim the homeowner is excluded as being a contractor under the exclusion. These are absurd results.

Plaintiff-Appellant agreed that literally including every property owner leads to an absurd result and the term "any property owner" should be interpreted to be less inclusive. The trial court also found that the term "any property owner" had to be interpreted to be less than every literal property owner, in order for the exclusion to make sense.

The Court of Appeals held there is a more reasonable interpretation of "property owner" as follows:

> "[w]e believe that the better interpretation of 'any property owner,' given that it is included in a list that otherwise only includes those that have a commercial interest (or their employees), is that it does not include those without a commercial interest in the project, namely, in this case, the residential homeowner. Or, as Judge Posner ultimately reasoned in *Paszko*, when faced with two plausible interpretations, we must select the one that favors the insured and, therefore, the interpretation that excludes a residential homeowner from the definition of 'contractor' 'thus rules the case.'"
>
> *Atlantic Casualty Insurance Company v Gustafson,*891 NW2d 499, 505; 315 Mich App 533 (2016) (citing *Atlantic Casualty Insurance Company v. Paszko Masonry, Inc.*, *supra* at 725) [Exhibit 1].

The Court of Appeals properly held that the need for an interpretation of the exclusion and the fact that multiple interpretations are plausible shows an ambiguity exists. (Exhibit 1, pgs. 4-5).

2) Exclusions to Insurance Policies are Strictly Construed in Favor of Coverage.

We are guided by the following rules found in case law:

a) "Exceptions in an insurance policy to the general liability provided for are to be strictly construed against the insurer." *Powers v Detroit Auto. Inter-Insurance Exchange*, 427 Mich 602, 623; 398 NW2d 411 (1986);a plurality opinion which provides us with guidance [citing *Pietrantonio v Travelers Ins Co*, 282 Mich 111, 275 NW2d 786 (1937)].

b) An insurer may not escape liability by taking advantage of an ambiguity . . . Whenever there are two constructions that can be placed upon the policy, the construction most favorable to the policyholder will be adopted. *Id*. at 623 [citing *Hooper v State Mutual Life Assurance Co*, 318 Mich 384, 393; 28 NW2d 331 (1947) and *DeLand v Fidelity Health & Accident Mutual Ins Co*, 325 Mich 9, 18; 37 NW2d 693 (1949)].

In our case there are at least three possible interpretations of "property owner":

I) The literal interpretation of a property owner being a person owning any property, to include the clothes on ones back.

ii) The limited interpretation desired by Atlantic Casualty to include the Homeowner as a property owner, but not to go any further as suggested by a literal interpretation.

iii) To interpret property owner, in the context of the exclusion as being a contractor, or persons and entities (including employees thereof) with a commercial interest in the construction project; i.e. those receiving compensation from the construction project. This does not include the homeowner.

As Judge Posner reasoned in *Paszko*, *supra* (Exhibit 3), when faced with two

plausible interpretations of an exclusion, we must select the one that favors the insured and, therefore, the interpretation that excludes a residential homeowner from the definition of 'property owner' and 'contractor' rules the case.

3) Strict Scrutiny of Exclusion Applies to Unambiguous Exclusion As Well

Even if, *arguendo*, the term "property owner" is not ambiguous, we still interpret the exclusion with strict scrutiny.

Strict scrutiny requires that we interpret the exclusion in favor of coverage. *Pietrantonio v Travelers Ins Co*, 282 Mich 111, 116; 275 NW2d 786 (1937). As discussed previously, if we apply strict scrutiny to the exclusion as a whole, in favor of maintaining coverage, the residential homeowner should not be considered as a contractor so as to avoid coverage.

4) Summary

In summary, the Supreme Court should affirm the Court of Appeals holding that an ambiguity exists in the exclusion because there is more than one plausible interpretation of property owner and the interpretation of the insurance exclusion should be strictly construed in favor of coverage, which interprets a property owner and thereby a contractor, as being those persons and entities with a commercial interest in the construction project and does not include the residential homeowner. Even if the term "property owner" is found to be unambiguous, under strict scrutiny analysis and using typical Michigan rules of policy interpretation, the residential homeowner should not be included as a contractor, for the sake of the exclusion and avoiding coverage.

II. MUST A PROPERTY OWNER HAVE A COMMERCIAL INTEREST IN THE PROJECT BEFORE THE EXCLUSION FOR "EMPLOYEES, CONTRACTORS, AND EMPLOYEES OF CONTRACTORS" APPLIES TO THAT PROPERTY OWNER?

1) Common and Plain Meaning of being a Contractor

In order for the exclusion to apply, the residential homeowner has to be considered a "contractor" and included in the exclusion for Employees, Contractors, and Employees of Contractors. The definition provided in the exclusion includes a "property owner" as a contractor doing work or providing supplies and Atlantic Casualty thereby claims the residential homeowner is a contractor.

It is important to look at the common definition of a contractor. In determining the plain meaning of a word, a court may look to the definition of the word in a recognized dictionary. In *Allstate Inc Co v Freeman*, 432 Mich 656, 698; 443 NW2d 734 (1989), the Michigan Supreme Court referred to *Black's Law Dictionary* and the *American Heritage Dictionary* for definitions of basic words.

DEFINITIONS

a) Contractor: A party to a contract. More specifically, one who contracts to do work or provide supplies for another. *Black's Law Dictionary*, Eighth Edition, Bryan A. Garner, Editor in Chief, p. 350.

b) Contractor: One who agrees to furnish materials or perform services at a specified price, especially for construction. The *American Heritage Dictionary*, Second College Edition, Houghton Mifflin Company, Copyright 1982, p. 318.

c) Contractor: A builder, etc. who contracts to supply materials or do work. Webster's New World Dictionary, Victoria Neufeldt, Editor in Chief, Copyright 1995, p. 133.

d) The term "Contractor" has special meaning in Michigan law and in the context of improvements to real property. Improvements to real property fall under the auspices of the Construction Lien Act ("CLA"), MCL 570.1101 et seq. The CLA provides definitions for the various parties involved in the contract for improvements to real property. Under the CLA, "Contractor" means a person who, pursuant to a contract with the owner or lessee of real property, provides an improvement to real property, MCL 570.1103(5); an "Owner" means a person holding a fee interest in real property or an equitable interest arising out of a land contract, MCL 570.1105(3). In the subject contractual relationship, Gustafson is a Contractor and the homeowner is an Owner (the homeowner is not a Contractor).

It is clear that a "contractor" is commonly defined as one who furnishes materials or performs services in relation to an improvement to real property (construction) and is compensated for such materials or services. The homeowner is simply not a contractor.

2) <u>Judicial Interpretation of the Atlantic Casualty Exclusion</u>

The Connecticut Court held that the "Exclusion of Injury to Employees, Contractors and Employees of Contractors" is meant to apply to employees of a project and does not apply to the homeowner. *Turano v. Pellaton*, *supra*. In other words, the exclusion applies to persons being paid as part of the construction project.

Similarly, the Michigan Court of Appeals in our case held that "any property owner" refers to someone, or some entity, who is commercially involved in the work being done (being paid for improvements to real property).

The Court of Appeals employed the associated-words canon, or *noscitur a sociis*.[1] This principle says that when several words are associated in a context,

[1] The Court of Appeals correctly determined that the Trial Court erred when it employed the principle of *ejusdem generis*, because that principle requires an interpretation of a general term that falls at the end of a list of specific terms, which is inapplicable to our facts. *Atlantic Casualty Insurance Company v Gustafson,*891 NW2d 499, 503; 315 Mich App 533 (2016) (Exhibit 1).

suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar. The canon especially holds that words grouped in a list should be given related meanings. *Atlantic Casualty Insurance Company v Gustafson,*891 NW2d 499, 503; 315 Mich App 533 (2016) (Exhibit 1).

In our case, the subject exclusion contained categories of persons and entities, which all had a commercial interest in the project (were being paid for services or materials).

3) Contractors Have a Commercial Interest in the Project

Finding that all of the persons and entities included in the exclusion have a "commercial interest" in the project, is just another way of saying all of the persons and entities are "contractors," as that term is commonly used and understood, *supra*.

Contractors provide services and materials to a project for monetary consideration. Homeowners do not provide services and materials to a project for monetary consideration.

4) Exclusion Meant for Those Persons and Entities with their Own Insurance

There is a particular and common reason for these types of exclusions to be included in general liability insurance contracts: Contractors (persons and entities with a commercial interest) should have their own commercial general liability insurance and/or worker's compensation insurance to insure against injuries. Atlantic Casualty's general liability insurance should be for innocent third parties who are injured on the construction site, such as the residential homeowner in our case.

If the property owner was coincidentally also a commercial developer, then the exclusion would apply, since he would then have a commercial interest in the project.

5) What Constitutes a Commercial Interest?

In order to determine a commercial interest in something, we look to the definition of "commercial."

DEFINITIONS

a) Commercial: Made or done for profit. *Webster's New World Dictionary,* Victoria Neufeldt, Editor in Chief, Copyright 1995, p. 121.

b) Commercial: Having profit as a chief aim. The *American Heritage Dictionary,* Second College Edition, Houghton Mifflin Company, Copyright 1982, p. 297.

As the term "commercial interest" is used in the Court of Appeals decision in our case, it clearly means a person or entity being paid or seeking a profit on the construction project.

It is clear that the residential homeowner did not have a commercial interest in the project and is not included as a contractor for the exclusion. This decision is in accordance with the common definition of a commercial interest and the common definition of a contractor.

6) Summary

In summary, all of the persons or entities included in the "Exclusion of Injury to

Employees, Contractors and Employees of Contractors" have a commercial interest in the construction project (they are being paid for services or materials for the project). The residential homeowner should not be included in this exclusion, since he does not have a commercial interest in the project. According to the Michigan Construction Lien Act, the residential homeowner has a special position in the construction relationship, he is the "Owner." He is not the contractor and he does not have a commercial interest in providing services or materials for the project.

III. SHOULD THE TITLE (HEADING) OF THE EXCLUSION BE GIVEN WEIGHT IN THE INTERPRETATION OF THE EXCLUSION?

1) Every Word, Phrase, and Clause is Given Effect

[c]ourts must also give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory. *Klapp v United Ins. Group Agency, Inc.*, 468 Mich 459, 468; 663 NW2d 447 (2003).

The heading of the exclusion is part of the words employed in the exclusion and should be read in harmony with the other words of the exclusion.

2) Connecticut Law Has Similar Rules of Contract Interpretation Concerning Headings or Titles.

In an attempt to distinguish the Connecticut legal analysis, Atlantic Casualty claimed in its Application to the Michigan Supreme Court that "[C]onnecticut law

requires that the language of the headings and sub-headings in the insurance policy govern the meaning and interpretation of the terms they precede . . ." and Atlantic Casualty thereby concludes the Connecticut analysis is different than Michigan analysis of this same Atlantic Casualty exclusion. But Atlantic Casualty fails to show any citations or basis for this unsubstantiated claim. In fact, the analysis of the Superior Court of Connecticut in *Turano v. Pellaton*, *supra* (Exhibit 2), is in accordance with Michigan analysis. "When interpreting [an insurance contract], we must look at the contract as a whole, consider all relevant portions together and, if possible, give operate effect to every provision in order to reach a reasonable overall result." *Id*. at 6-7. Further, there is no provision in the policy that provides that headings are not relevant to the construction of provisions of the policy. *Id*. at 11.

Connecticut analysis uses the headings the same as Michigan by giving effect to every word, phrase, and clause in a contract; unless there is a provision stating that headings and titles will not be used in the interpretation of the contract.

3) <u>Atlantic Casualty Chose Not to Exclude Headings and Titles in the Interpretation of the Contract.</u>

Similarly as noted in the Connecticut case, if Atlantic Casualty desired the headings not to be used in the interpretation of the Michigan contract, they could have included a clause such as the following:

> Titles and headings to sections or paragraphs in the Agreement are inserted for convenience of reference only and are not intended to effect the interpretation or construction of this Agreement. (See Symposium on Boilerplate clauses in Contract. 104 Mich L Rev 821 (March 2006).

Atlantic Casualty chose not to exclude the headings and therefore, in accordance with *Klapp v United Ins. Group Agency, Inc.*, *supra*, the heading should be given effect in the interpretation of the contract of insurance and the subject exclusion.

4) Summary

In summary, the words employed in the heading of the exclusion should be given the same weight as other words employed in the exclusion and read together in harmony to provide a proper interpretation of the exclusion as a whole.

IV. WAS IT CLEAR IN THE EXCLUSION THAT A HOMEOWNER WOULD BE INCLUDED AS A CONTRACTOR AND EXCLUDED FROM COVERAGE UNDER THE EXCLUSION FOR EMPLOYEES, CONTRACTORS, AND EMPLOYEES OF CONTRACTORS?

1) Construction of the Exclusion

An insurer must draft the policy as to make clear the extent of nonliability under the exclusion clause." *Powers v Detroit Auto. Inter-Insurance Exchange*, 427 Mich 602, 623; 398 NW2d 411 (1986); a plurality opinion offered as guidance [citing *Francis v Scheper*, 326 Mich 441, 448; 40 NW2d 214 (1949)].

In our case, it is not clear that a residential homeowner would be included in an exclusion to a contractor's general liability policy of insurance entitled "**Exclusion of Injury to Employees, Contractors and Employees of Contractors**." The homeowner hired the contractor to do work on his residential property. The homeowner is neither a Contractor, nor an Employee of a Contractor.

2) Forced Construction of the Exclusion to Avoid Coverage Not Allowed

An insurer may not "escape liability by taking advantage of . . . a forced construction of the language in a policy . . ." *Id*. at 623-624 [citing *Hooper v State Mutual Life Assurance Co*, 318 Mich 384, 28 NW2d 331 (1947)].

In our case, Atlantic Casualty is attempting to force an interpretation of the exclusion for contractors to include the residential homeowner as being a contractor, so that Atlantic Casualty can escape liability under their policy of insurance.

3) Plainer and Clearer Language Could Have Been Employed in the Exclusion

"The courts have no patience with attempts by a paid insurer to escape liability by taking advantage of an ambiguity, a hidden meaning, or a forced construction of the language in a policy, when all question might have been avoided by a more generous or plainer use of words." *Id*. at 624 [citing *Hooper v State Mutual Life Assurance Co*, 318 Mich 384, 28 NW2d 331 (1947)].

In our case, whether the homeowner is a property owner, and thereby a contractor, under the exclusion is ambiguous. Even if it was not ambiguous, it would lead to an absurd result. If Atlantic Casualty intended to exclude homeowners from coverage they could have made that clear and apparent by plainer language in the heading and the body of the exclusion, in which case the consumer could make an informed decision whether to purchase their product (policy of insurance). As it is, the consumer (Gustafson) and his insurance agent both believed Gustafson was purchasing liability insurance that would cover an innocent residential homeowner that was injured.

Judge Posner of the United States Seventh Circuit Court of Appeals, in interpreting this exact same Atlantic Casualty exclusion, held that the exclusion was poorly drafted, resulting in alternative interpretations being plausible. *Atlantic Casualty Insurance Company v. Paszko Masonry, Inc.*, *supra* (Exhibit 3).

The Court of Appeals in our case held: "It should be noted that we are not suggesting that plaintiff could not write an exclusionary clause that excludes the property owner upon whose real property the insured is performing work. Rather, we merely conclude that plaintiff has not done so with the clause before us." Court of Appeals Opinion dated May 26, 2016, Docket No. 325739, page 5, footnote 12 (Exhibit 1).

4) <u>Deceptive Language Not Allowed</u>

"[Not] only ambiguous but deceptive. [The] policyholder must be protected against confusing statements in policies . . ." *Powers v Detroit Auto. Inter-Insurance Exchange*, *supra*, at 624 *[citing DeLand v Fidelity Health & Accident Mutual Ins Co*, 325 Mich 9, 17-18; 37 NW2d 693 (1949)].

In our case, it is clearly confusing for a residential homeowner to be considered a contractor (as being asserted by Atlantic Casualty) and then be included in an exclusion for contractors and employees of contractors. It could be considered as deceptive: writing the policy to attract consumers and then attempting a forced construction of the contractor exclusion using a hidden meaning to avoid paying on the insurance contract.

5) Summary

In summary, it is not clear from the language employed in the contract exclusion that an injured homeowner would be excluded from coverage under the contractor's general liability policy of insurance by being included in the "Exclusion for Employees, Contractors, and Employees of Contractors." Atlantic Casualty could have plainly excluded the residential homeowner from coverage, but that is not what the exclusion does as currently written.

RULE OF CONTRA PROFERENTEM NOT NECESSARY

It was not necessary for the Court of Appeals to apply the doctrine of contra proferentem in this case. The contra proferentem rule is applicable only as a last resort, when other techniques of interpretation and construction have not resolved the question of which of two or more possible reasonable meanings the court should choose. *Klapp v United Ins. Group Agency, Inc.*, 468 Mich 459, 473; 663 NW2d 447 (2003).

In our case, it is not necessary to use the contra proferentem rule to assist in the interpretation of the exclusion. Other techniques of contract interpretation are available and include the following:

1) Strict scrutiny is used to interpret an exclusion to an insurance contract. Strict scrutiny requires that we interpret the exclusion in favor of coverage. *Pietrantonio* at 116, *supra*.

2) The courts have no patience with attempts by a paid insurer to escape

liability by taking advantage of an ambiguity, a hidden meaning, or a forced construction of the language in a policy, when all question might have been avoided by a more generous or plainer use of words. *Hooper v State Mutual Life Assurance Co*, 318 Mich 384, 28 NW2d 331 (1947).

3) [c]ourts must also give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory. *Klapp* at 468, *supra*. The heading of the exclusion is part of the words employed in the exclusion and should be used in harmony with the other words of the exclusion to interpret the exclusion.

4) Ordinary and common meanings are employed, including the ordinary and common meaning of "contractor" and of "commercial interest."

5) If a term is ambiguous in the insurance exclusion, it is construed against the drafter and in favor of coverage. *Nikkel* at 566,*supra*.

6) The principle of *noscitur a sociis* says that when several words are associated in a context, suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar.

7) Absurd results are to be avoided. *Hastings* at 297, *supra*.

In summary, these are but some of the interpretative tools available to the judiciary. In our case, whether the term "property owner" as being a contractor is found to be ambiguous or found to be unambiguous, the rules for interpretation of an exclusion to an insurance contract dictate that the exclusion is interpreted in favor of coverage. There is no need to apply the rule of contra proferentem to the facts in our

case. Further, it is inappropriate to apply the rule of contra proferentem to our case, since it is a last-ditch effort at interpretation of a contract, which is only to be used after all other avenues have failed.

CONCLUSION

In conclusion, the term "property owner," as used in the subject exclusion is ambiguous, because there are multiple, plausible interpretations of that term. Since the term "property owner" is ambiguous, the interpretation of the exclusion in favor of coverage should be employed, which is that the residential homeowner is not a contractor for the sake of the exclusion.

Even if, *arguendo*, the term "property owner" is not ambiguous, strict scrutiny analysis of the exclusion as a whole and other interpretation tools dictate in favor of coverage, with a determination that the residential homeowner is not excluded from coverage.

The exclusion as written applies to persons and entities having a commercial interest in the construction project (i.e. being paid and seeking a profit), as those persons and entities are commonly expected to obtain their own liability and other insurance.

In order to be included in the exclusion, persons and entities must have a commercial interest in the construction project. The residential homeowner in our case does not have a commercial interest in the construction project. He is the person paying to have the brush removed from around his backyard pond and he is not paid in relation to that construction activity. As defined in the Michigan Construction Lien Act,

the residential homeowner is the "Owner" and the persons and entities performing the improvements are the "Contractors." The residential homeowner is not considered to be a Contractor and should not be included in the contractor exclusion.

The heading/title should be read in harmony with the other words and terms in the exclusion, since Atlantic Casualty chose not to exclude the heading/title from being included in an interpretation. To include the residential homeowner as being a contractor for the sake of the exclusion would require a forced construction of the exclusion language, using a hidden meaning, to allow the insurer to escape from its liability under the terms of the insurance contract, which is contrary to the interpretation of insurance exclusions.

Whether we analyze the insurance exclusion as being ambiguous or analyze the insurance exclusion under strict scrutiny as being unambiguous but requiring interpretation, we achieve the same conclusion in favor of coverage. The appropriate flow-chart for the interpretation of exclusions in an insurance policy is attached as Exhibit 4.

RELIEF REQUESTED

Defendant-Appellee Gustafson respectfully requests this court deny Plaintiff-Appellant Atlantic Casualty Insurance Company's Application for Leave to Appeal the decision of the Court of Appeals.

/s/ William T. Nordeen
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